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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 George L. Mortensen, individually and)
as Personal Representative of his)
10 deceased wife Erna H. Mortensen,)

No. CV-08-1669-PHX-NVW

ORDER

11 Plaintiff,

12 vs.
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Home Loan Center, Inc. (HLC), a)
14 California corporation, dba Lending Tree)
Loans; RLI Insurance Company, an)
15 Illinois corporation; Kenneth J. Block,)
designated broker for HLC; and Anthony)
16 Gutierrez, a Senior Mortgage Banker)
with HLC,)

17 Defendants.
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20 Before the Court are Defendants' and Plaintiff's Motions for Summary Judgment.
21 (Doc. 73, 76.) Plaintiff's request for oral argument will be denied because the issues have
22 been fully briefed and oral argument will not aid the Court's decision. *See Partridge v.*
23 *Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

24 **I. Legal Standard**

25 Summary judgment is proper if the evidence shows there is no genuine issue as to
26 any material fact and the moving party is entitled to judgment as a matter of law. Fed. R.
27 Civ. P. 56(c). The moving party must produce evidence and show there is no genuine
28 issue of material fact. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d

1 1099, 1102 (9th Cir. 2000). If the burden of persuasion at trial would be on the
2 nonmoving party, the party moving for summary judgment may carry its initial burden of
3 production under Rule 56(c) by producing “evidence negating an essential element of the
4 nonmoving party’s case,” or by showing, after suitable discovery, that the “nonmoving
5 party does not have enough evidence of an essential element of its claim or defense to
6 carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz*
7 *Cos.*, 210 F.3d 1099, 1105-06 (9th Cir. 2000); *High Tech Gays v. Defense Indus. Sec.*
8 *Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990).

9 The party seeking summary judgment bears the initial burden of identifying the
10 basis for its motion and those portions of the pleadings, depositions, answers to
11 interrogatories, and admissions on file, together with the affidavits, if any, which
12 demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*,
13 477 U.S. 317, 323 (1986). When the moving party has carried its burden, the nonmoving
14 party must produce evidence to support its claim or defense by more than simply showing
15 “there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*
16 *v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To defeat a motion for summary
17 judgment, the nonmoving party must show that there are genuine issues of material fact.
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

19 On summary judgment, the nonmoving party’s evidence is presumed true, and all
20 inferences from the evidence are drawn in the light most favorable to the nonmoving
21 party. *Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987);
22 *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1117 (9th Cir. 2001). But the evidence
23 presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory and
24 speculative testimony in affidavits and moving papers is insufficient to raise genuine
25 issues of fact and to defeat summary judgment. *Thornhill Publ’g Co., Inc. v. GTE Corp.*,
26 594 F.2d 730, 738 (9th Cir. 1979).

27 In an ordinary civil case, *pro se* litigants are not treated more favorably than
28 parties with attorneys of record. *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

1 Moreover, *pro se* litigants must follow the same rules of procedure that govern other
2 litigants. *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

3 **II. Background**

4 In 2005, George and Erna Mortensen sold their home in Peoria, Arizona, in order
5 to pay some of their credit card debt. They reserved approximately \$65,000 of the
6 proceeds for a down payment on a new house. In June 2005, they executed a purchase
7 agreement with William Lyons Homes to buy a home in Surprise, Arizona, which they
8 intended to live in for about a year while on a waiting list to purchase a more expensive
9 Richmond American home in a gated community in Surprise. William Lyons Homes
10 required prospective buyers to obtain pre-approval through its preferred lender, Duxford
11 Financial, which offered the Mortensens a thirty-year home loan at a fixed rate of five or
12 six percent with monthly payments of \$1,500 or \$1,600.

13 Although both Mortensens signed the purchase agreement with William Lyons
14 Homes, they decided to remove Mr. Mortensen's name from the contract, title, and loan
15 so that he could apply for a separate loan to finance as his primary residence the home
16 they intended to purchase in the gated community. In the summer or fall of 2005, they
17 entered into a contract to purchase the Richmond American home, but later canceled that
18 contract.

19 Instead of accepting Duxford Financial's loan offer for the William Lyons home,
20 the Mortensens obtained a thirty-year variable rate loan from the Home Loan Center (the
21 "Loan"). Mr. Mortensen negotiated the terms of the Loan with Anthony Gutierrez, a
22 Home Loan Center employee. Mrs. Mortensen did not speak with Gutierrez or anyone
23 else at the Home Loan Center until after the closing of the Loan.

24 On July 18, 2005, Home Loan Center sent the Mortensens a "Purchase
25 Certification of Loan Pre-Approval Commitment." On July 20, 2005, Mr. Gutierrez
26 prepared a loan application from information provided telephonically by Mr. Mortensen.
27 Also on July 20, 2005, Home Loan Center mailed the Mortensens federally required
28 disclosures, including an "ARM Program Disclosure," a good faith estimate of settlement

1 charges, and a preliminary Truth in Lending Act disclosure. On July 22, 2005, Home
2 Loan Center mailed the Mortensens a "Lock-in Disclosure and Agreement," which Mrs.
3 Mortensen signed to lock in the initial interest rate of the Loan.

4 Mrs. Mortensen did not remember reading any of the documents the Mortensens
5 received. Before closing, Mrs. Mortensen discussed with her husband what their
6 anticipated payments on the Loan would be, but she did not know what the loan interest
7 rate would be. She did not remember that the first month's interest rate would be one
8 percent and remembered focusing only on the monthly payment schedule.

9 On August 18, 2005, Mrs. Mortensen attended the closing at the offices of Security
10 Title alone because Mr. Mortensen was out of town. At closing, Mrs. Mortensen was
11 presented with loan documents, including an "Adjustable Rate Mortgage Loan Program
12 Disclosure," a "Prepayment Penalty Option Disclosure," a Truth in Lending Disclosure
13 Statement, the Adjustable Rate Note, and Deed of Trust. The Adjustable Rate Note
14 executed by Mrs. Mortensen during closing advises of possible negative amortization in
15 Section 3(E) titled "Additions to My Unpaid Principal." Mrs. Mortensen did not notice
16 the loan interest rate on the closing documents, but rather focused on the payment plan,
17 which she found to be "pretty favorable."

18 During closing, the closing officer specifically explained to Mrs. Mortensen there
19 was a three-year prepayment penalty, which concerned Mrs. Mortensen. She tried to call
20 Mr. Mortensen regarding the prepayment penalty, but he did not answer his telephone.
21 She considered not signing the loan documents that day, but decided to go ahead with the
22 closing because their temporary living conditions were very inconvenient and stressful.

23 The Loan has four payment options: negative amortization, interest only, full
24 fifteen-year amortization, and full thirty-year amortization. When the Loan originated,
25 the minimum monthly payment was \$802.81 for the first year. As of September 2009, the
26 minimum monthly payment was approximately \$1,100, and the interest-only payment
27 was approximately \$1,200.

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1 Three to six months after closing, the Mortensens tried to sell their William Lyons
2 home. The only offer they received was for \$300,000, which they rejected because they
3 had purchased the house for approximately \$326,000.¹ In early 2006, they obtained a
4 home equity line of credit in the amount of \$65,000 on the William Lyons home.

5 On January 29, 2007, Mrs. Mortensen sent a memo to Countrywide Mortgage Co.,
6 which stated that she was disturbed regarding the Loan's negative amortization and three-
7 year early surrender penalty. In June 2007, the Mortensens filed a complaint, which is
8 similar to the one filed in this lawsuit, against Home Loan Center with the Arizona
9 Department of Financial Institutions. On November 23, 2007, after review of the
10 complaint and examination of corresponding documentation, the Arizona Department of
11 Financial Institutions closed the complaint without initiating any administrative
12 enforcement action.

13 In August 2007, the Mortensens moved out of their William Lyons home and into
14 a new home they purchased in north Peoria, Arizona. Since September 2007, they have
15 had renters in the William Lyons home who pay \$1,150 per month. The Mortensens have
16 not made payments on the Loan since about September 2008. Instead, Mr. Mortensen is
17 using the rental income to compensate himself for the time he spends related to this
18 lawsuit.

19 On August 14, 2008, the Mortensens initiated this lawsuit in Maricopa County
20 Superior Court. On September 10, 2008, this case was removed to the federal district
21 court. On January 16, 2009, the district court dismissed Mr. Mortensen's Truth in
22 Lending Act ("TILA") claims because TILA confers a statutory right of action only on a
23 borrower in a suit against the borrower's creditor, and Mr. Mortensen did not execute the
24 Loan documents. (Doc. 22.)

25 On September 1, 2009, the Mortensens amended their complaint. The First
26 Amended Complaint includes five counts:

27
28 ¹The actual purchase price for the house was \$312,484.

- (1) Misrepresentation, Concealment of Material Facts (violation of A.R.S. § 6-947 and the Truth in Lending Act (“TILA”), 15 U.S.C. § 1638(a)(4));
 - (2) Breach of Fiduciary Duty;
 - (3) Misleading Advertising (violation of TILA);
 - (4) Bond Claim; and
 - (5) Commingling of Funds (in violation of A.R.S. § 6-947(C)).
- (Doc. 44.)

On December 12, 2009, Mrs. Mortensen passed away. On May 12, 2010, George Mortensen, as Personal Representative of his deceased wife Erna Mortensen, was substituted as the party plaintiff in her place.

III. Analysis

A. Plaintiff Has Not Produced Evidence to Establish a Genuine Issue of Material Fact Regarding Whether Defendants Made Misrepresentations, Concealed Material Facts, Failed to Make Required Disclosures, or Committed Fraud.

Essential to a claim for fraud, fraudulent misrepresentation, fraudulent concealment, or failure to disclose is a false statement or a failure to make a truthful disclosure. *See, e.g., Haisch v. Allstate Ins. Co.*, 197 Ariz. 606, 610, ¶ 14, 5 P.3d 940, 944 (Ct. App. 2000); *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982). Further, to prove fraud, a plaintiff must produce evidence showing that he reasonably relied on the false statement or omission. *Id.* In his motion for summary judgment and response to Defendants’ motion for summary judgment, Plaintiff has not produced evidence that Defendants made any false statements or failed to truthfully disclose anything they were required to disclose. At most, he has shown potential confusion before closing about the Loan’s interest rate after the first month and no detrimental reliance, much less reasonable reliance, on any possible understanding that the Loan’s interest rate would be one percent for more than one month.

Plaintiff contends that Gutierrez failed to disclose the Loan’s prepayment penalty and negative amortization and that the first month’s interest was a “teaser rate.” Mrs. Mortensen did not speak with Gutierrez before closing, so he could not have made any

1 false statements to her. In deposition, Mr. Mortensen testified that he spoke with
2 Gutierrez a couple of times, Gutierrez notified the Mortensens the Loan was interest only,
3 and Mr. Mortensen did not remember Gutierrez saying anything about the interest rate,
4 only the amount of the monthly loan payments. Gutierrez told Mr. Mortensen that “we
5 can always beat the builder’s lender.” Mr. Mortensen conceded that monthly payments
6 under the Loan were less than those that would have been required under the loan offered
7 by the builder’s lender.

8 Mr. Mortensen also testified that the preliminary Truth-in-Lending Disclosure
9 dated July 20, 2005, misrepresented the Loan’s interest rate. In a box outlined in bold,
10 under the title “ANNUAL PERCENTAGE RATE,” the document states, “The cost of
11 your credit as a yearly rate.” and “5.7012%.” Several inches below that, in bold, is the
12 following: “Note Rate: 1.0000 %.” Immediately below that there is an “X” by the
13 following: “This transaction is subject to a variable rate feature and is secured by your
14 principal dwelling. Variable rate disclosures have been provided to you at an earlier
15 time.” Mr. Mortensen testified that it was confusing to have two interest rates on the
16 same page, but he did not seek clarification because he did not rely on that document.
17 Instead, he relied on the Lock-in Disclosure and Agreement and the Purchase
18 Certification of Loan Pre-Approval Commitment.

19 The Lock-in Disclosure and Agreement, with Mrs. Mortensen’s signature dated
20 July 22, 2005, states in part:

21 Loan Program: 1 MONTH MTA - JUMBO HARD P3

22 Documentation Type: STATED DOC

23 Loan Amount: \$249,600.00 Interest Rate: 1.000%

24 . . .

25 Prepay Term (Years): 3

26 Lock Deposit: \$400.00

27 The Purchase Certification of Loan Pre-Approval Commitment, dated July 18, 2005,
28 states:

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Details of the Purchase:

Purchase Price	\$312,000
Loan Amount (not to exceed):	\$255,000
Min. Down Payment:	0-20%
Residency:	Primary
Loan Term:	Interest Only Option
	30 Year Term

The Lock-in Disclosure and Agreement plainly states “1 MONTH.” It does not state that the *annual* percentage rate is one percent. To the extent that the one percent rate was not clearly limited to one month, any reliance on such ambiguity was not reasonable, especially when the closing documents unambiguously stated a higher annual percentage rate for interest.

Plaintiff also contends that Gutierrez misrepresented that he spoke with Mrs. Mortensen when he took her loan application by telephone and that Dwinnie Lee, an account manager with Home Loan Center, certified that she spoke with Mrs. Mortensen about her credit report. The alleged misrepresentations were not made to either of the Mortensens and could not have been intended for their reliance. The Mortensens did not learn of these alleged misrepresentations until discovery and have not alleged any reliance on or harm caused by the alleged misrepresentations. Even if these records incorrectly suggest communications were made with the loan applicant, Mrs. Mortensen, instead of clarifying that the communications were made with Mr. Mortensen, no evidence of harm has been produced.

To the extent that Plaintiff contends Defendants misrepresented or failed to disclose the three-year prepayment penalty and negative amortization provisions of the Loan before closing, Mrs. Mortensen’s testimony establishes that she did not rely on any information she received before closing except for the payment schedule, and she carefully considered the three-year prepayment penalty provision before she signed the closing documents on August 18, 2005.

1 Therefore, there is no genuine issue as to whether any of the Defendants made any
2 material misrepresentation, committed fraud, or concealed or failed to disclose
3 information they were required to disclose to the Mortensens. There is no genuine issue
4 as to whether either Mr. or Mrs. Mortensen relied on any misrepresentation. Even if any
5 of the Defendants owed either Mr. or Mrs. Mortensen a fiduciary duty, it was not
6 breached.

7 For the foregoing reasons, Defendants will be granted summary judgment on
8 Counts One, Two, and Three. Because Count Four is a claim on Home Loan Center's
9 bond deposited with the Arizona Department of Financial Institutions and depends on
10 finding liability under Counts One, Two, or Three, it also must fail.

11 **B. Plaintiff Has Not Produced Any Evidence to Justify Equitable Tolling**
12 **of the Statute of Limitations for TILA.**

13 Plaintiff contends that Defendants violated 15 U.S.C. § 1638(a)(4), which requires
14 a creditor to disclose the "finance charge expressed as an 'annual percentage rate,' using
15 that term," and 15 U.S.C. § 1664(c), which requires an advertisement related to consumer
16 credit that states the rate of a finance charge to state the rate of that charge expressed as
17 an annual percentage rate. The preliminary Truth-in-Lending Disclosure stated the
18 "annual percentage rate" was 5.7012%, but also stated, "Note Rate: 1.0000%." The
19 Truth-in-Lending Disclosure signed by Mrs. Mortensen at closing stated the "annual
20 percentage rate" was 5.742% and does not reference a "Note Rate." It does state,
21 however, that the Loan contains a variable rate feature. Plaintiff does not dispute the
22 truthfulness of the Truth-in-Lending Disclosure provided for Mrs. Mortensen to sign at
23 closing.

24 Any action under TILA must be brought within one year from the date of the
25 occurrence of the alleged violation. 15 U.S.C. § 1640(e). The limitations period in
26 § 1640(e) generally runs from the date of consummation of the transaction, which was
27 August 18, 2005, and therefore expired before the Mortensens initiated this action. *See*
28 *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986).

1 “[T]he doctrine of equitable tolling may, in the appropriate circumstances, suspend
2 the limitations period until the borrower discovers or had reasonable opportunity to
3 discover the fraud or nondisclosures that form the basis of the TILA action.” *Id.* Plaintiff
4 argues that the limitations period should be tolled while the administrative claim was
5 pending, but offers no authority for equitable tolling beyond the time the borrower
6 discovered or had reasonable opportunity to discover the allegedly improper disclosure.

7 Even if Mrs. Mortensen had read and was confused by the preliminary Truth-in-
8 Lending Disclosure and the Lock-in Disclosure and Agreement, by January 2007, when
9 she wrote to Countrywide, she was aware that the principal amount of the debt was
10 increasing while they were making payments, and therefore the Loan was not accruing
11 interest at the annual rate of one percent. Thus, the one-year limitations period would
12 have expired no later than January 2008, even if the doctrine of equitable tolling were
13 applied liberally.

14 **C. Plaintiff Has Not Produced Evidence to Establish Either of the**
15 **Mortensens Were Owed a Fiduciary Duty.**

16 A lender does not owe a borrower a fiduciary duty in an ordinary loan transaction.
17 *McAlister v. Citibank*, 171 Ariz. 207, 212, 829 P.2d 1253, 1258 (Ct. App. 1992). To
18 establish that any of the Defendants owed the Mortensens a fiduciary duty, Plaintiff must
19 show that the Defendant acted as their financial advisor and they relied upon the
20 Defendant’s financial advice. *Id.* Plaintiff has not produced any evidence that any
21 Defendant acted as the Mortensens’ financial advisor or that they relied on the
22 Defendant’s financial advice. In deposition, Mr. Mortensen testified that he did not have
23 a relationship with any of the three individual Defendants, Kenneth Block, Billy Boulden,
24 and Anthony Hsieh. Mrs. Mortensen did not speak with anyone but the closing officer.
25 Mr. Mortensen testified that the only basis for a fiduciary relationship was that these
26 individuals represented their companies and should have been supervising their loan
27 officers and staff.

28 Plaintiff also contends that the individual Defendants violated A.R.S. § 6-947(P),
which requires a mortgage banker to reasonably supervise the activities of a licensed loan

1 originator employed by the mortgage banker. Even if Plaintiff has a private right of
2 action to enforce A.R.S. § 6-947(P), which the Court does not decide here, there is no
3 evidence from which to conclude that any of the individual Defendants failed to
4 reasonably supervise the activities of a licensed loan originator or that any loan originator
5 committed any wrongdoing under the supervision of any of the individual Defendants.

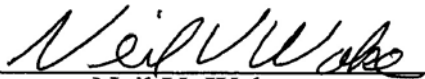
6 **D. Plaintiff Has Not Produced Evidence Showing Improper Commingling.**

7 Plaintiff contends that Defendant Home Loan Center commingled monies in
8 violation of A.R.S. §§ 6-946(C) and 6-947(C). Mrs. Mortensen signed a forty-day Lock-
9 In Disclosure and Agreement to lock in a one percent interest rate for the first month of
10 the Loan and paid a \$400.00 non-refundable fee to secure the rate. The Lock-In
11 Disclosure and Agreement stated that the fee would not be refunded but would be
12 credited to the borrower if the loan closed. The closing documents indicate that Mrs.
13 Mortensen was given a \$400.00 credit as promised. Plaintiff has produced no evidence to
14 show that any of the Defendants improperly handled the \$400.00 or that Plaintiff was
15 damaged thereby.

16 IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment
17 (Doc. 73) is granted and Plaintiff's Motion for Summary Judgment (Doc. 76) is denied.

18 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendants
19 and against Plaintiff. The Clerk shall terminate this case.

20 DATED this 28th day of July, 2010.

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24 Neil V. Wake
25 United States District Judge
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